

University of Minnesota Law School Scholarship Repository

Constitutional Commentary

1989

Original Intentions, Standard Meanings, and the Legal Character of the Constitution.

Richard S. Kay

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Kay, Richard S., "Original Intentions, Standard Meanings, and the Legal Character of the Constitution." (1989). *Constitutional Commentary*. 881.

<https://scholarship.law.umn.edu/concomm/881>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

ORIGINAL INTENTIONS, STANDARD MEANINGS, AND THE LEGAL CHARACTER OF THE CONSTITUTION

*Richard S. Kay**

"[P]retty much all law," Holmes wrote in his dissent in *Adkins v. Children's Hospital*,¹ "consists in forbidding men to do some things they want to do . . ." The Constitution is no exception. It is, of course, in a very important sense, also an empowering instrument. But even there it simultaneously creates power and limits it by channelling the exercise of power through prescribed institutions and procedures. The recognition of the Constitution as law—and law as essentially restraint—immediately engages the preoccupation of modern constitutional scholarship, the exercise of constitutional judicial review. As with all law, the capacity of the Constitution to restrain depends upon its interpretation and application by human agents.² The nature of the actual restraints felt by governing officials will turn on how those agents, the judges, understand and execute their job.

Much of the recent writing on this subject discusses whether judges ought or (more commonly) ought not to interpret constitutional rules as those rules were understood by the people who created them.³ Critics of originalism have launched a barrage of

* Professor of Law, University of Connecticut, School of Law. This paper is a revision and development of one theme in a longer essay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 N.W. U.L. REV. 226 (1988), in which I deal generally with the difficulties which have been argued to exist in any form of adjudication which attempts to apply constitutional rules in the senses intended by their creators.

1. 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

2. Judicial review, of course would have a restraining effect on the other branches even if it were entirely unrestrained. But in that case the *Constitution* would not be the source of the restraint (except insofar as it was believed to vest the unrestrained power in the judges.) The restraining power of the Constitution depends upon the regularity of its interpretation and application by the judges. See J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 170-72 (1963). The question then is converted to one about the restraints the Constitution imposes on the pronouncements of the judges.

3. By "create" I mean to give the force of law. See *infra* text accompanying notes 12-15. I will generally refer to these people as the "constitution-makers." I will not here discuss

objections to it, some going to its desirability and some to its practicality. I plan here to discuss only one of those objections. It is, however, in a way, a threshold objection, for it is based on what turns out to be an assertion about what the Constitution is. It holds that it is inappropriate to be tied to the intentions of the constitution-makers because it is the Constitution, itself, which ought to control. It is not the intention of the constitution-makers but their product which is important. This position is summarized in another Holmes epigram: "We do not inquire what the legislature meant; we ask only what the statute means."⁴

My response to this objection is in two parts. First, we cannot conceive of language without associating it with *some* intention. Second, to choose an intention other than one fairly attributable to the constitution-makers is inconsistent with generally accepted ideas of what makes a constitution binding law.

In considering the first point it is important to keep in mind the nature of language. Marks on paper or sound in the air mean nothing by themselves. If we find some scratches on the bark of a tree or hear the leaves rustling in the wind we will not usually stop to consider their meaning. Only when we suspect that some intelligence arranged the scratches or rustling to communicate a message will we behave differently.⁵ When we see aggregations of letters and hear certain familiar sounds we suppose, based on long experience, there is some intelligence responsible for their presence.⁶ Language

how those people are identified or how their intentions are discerned, distilled, and combined. Rather, for the purpose of the limited question, with which I am concerned here, I assume that those intentions may be identified. That assumption is also entailed in the argument for the priority of the text.

It must be emphasized that these are intentions about the extent and consequences within the legal system of the rule that the constitution-makers were creating. They are *not* intentions about the resolutions of specific controversies.

Finally, I make here no assumption about the nature of those intentions. A finding that the Constitution was intended by the constitution-makers to impose only weak restraints on later decisionmakers would not be inconsistent with the position on the character of constitutional rules for which I am arguing.

4. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). In constitutional scholarship this idea has been labelled "textualism." See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 205 (1980). Some expressions of this position are found in Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 459-60 (1984); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 186-87 (1981); Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 688 (1987); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 809-12 (1982).

5. See P. JUHL, INTERPRETATION: AN ESSAY IN THE PHILOSOPHY OF LITERARY CRITICISM 82-86 (1980); Knapp & Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 725-30 (1982).

6. "Suppose that printing type thrown by the handful from the top of a tower fell to earth to form Racine's *Athalie*, what would be the conclusion? *That some intelligence has governed the fall and the arrangement of the type.* No other conclusion could sensibly be reached." J. DE MAISTRE, *THE WORKS OF JOSEPH DE MAISTRE* 152 (J. Lively ed. 1965).

meaning independent of some human intention, real or postulated, does not exist.

This is not to say that we always must have reference to the actual intention of the writer. Nothing is more common than to encounter words about whose origin we are, in fact, ignorant and, indeed, uninterested. For example, when we see a sign with the words "Do Not Enter," we feel no difficulty in saying we know the words' meaning and in acting on that meaning.⁷ But this is because we have a long experience of seeing and hearing human beings use those words in connection with a particular intention. So, in this case it is not quite right to say that the words have a meaning independent of any intention. Rather we suppose that someone posted the sign with the ordinary intention associated with those words. We take the sign to employ the words' "standard meaning," standard in the sense that people, in fact, most frequently use them in order to communicate that meaning.⁸

Usually the standard meaning coincides with the meaning intended by the actual author. It is a tautology that people ordinarily use words in the ordinary way. But this sensible way of dealing with language when we know nothing of the history of its creation will usually be abandoned when we do know something about the intention with which the words were uttered, if that intention conflicts with the standard meaning that we would provisionally assign in the absence of that knowledge.⁹ This is only because we have

7. See Graff, "Keep Off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405, 407 (1982).

8. *Id.* at 407-08; see also E. HIRSCH, THE AIMS OF INTERPRETATION 62-63 (1976); Grice, *Meaning*, 66 PHIL. REV. 377 (1987). Some of the literature would make the same point by saying that the words, themselves, have a "meaning" (what I am calling the standard meaning) independent of any intention with which they are uttered. See, e.g., C. ALTIERI, ACT AND QUALITY 70 (1981) (discussing Strawson); Cartwright, *Propositions*, in ANALYTICAL PHILOSOPHY 81, 93-95 (R. Butler ed. 1962); Davidson, *A Nice Derangement of Epitaphs*, in TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON 433, 434 (E. LePore ed. 1986). Other writers have made the same distinction using different terms. For example H.P. Grice distinguishes between "timeless meaning" (standard meaning) and "occasion-meaning" (intended meaning). Grice, *Utterer's Meaning and Intentions*, 78 PHIL. REV. 147, 147-50 (1969). See also Moore, *supra* note 4, at 248 (distinguishing sentence-meaning, utterance-meaning and speaker's meaning). I do not believe anything in my argument turns on the particular terminology employed.

9. For example, a normal speaker of American English finding the words "No Football Coaches Allowed" would wonder about the motives for such a peculiar form of discrimination but would readily assume he understood the meaning of that phrase. But on learning that the words are found on a sign in the window of a fast food restaurant outside of Oxford in England, and of the different English uses of "football" and "coach," very few people would insist on the correctness of their prior understanding. I am grateful to my colleague, Jim Lindgren, for suggesting this illustration. Another way to make the same point is to say that in this context the standard meaning is different. But once we say that standard meaning may vary with context we have come a long way toward saying that any inquiry into meaning involves assumptions about the actual speaker's intentions. Context is relevant insofar as it

now acquired fresh information about the likely intention of the person who has used the words. For instance, we would react differently to "Do Not Enter" if we saw it written on a stack of invoices beside a computer terminal. Once we have a different idea about that intention there is little point on acting on a standard meaning that we think no one really intended.¹⁰ In our day-to-day transactions we are concerned with particular speech *acts*, with the use of language by an agent for a purpose.¹¹

This understanding of language use has particular force when the language use we are dealing with is enacted law. This brings me to the second part of my response. Reference to the intention with which a law was created is usually an essential part of the process by which we treat certain language as law. Any language meaning *can* be a source of restraint. But the capacity to restrain, by itself, is not sufficient to create law. *Legal* restraint must issue from a legitimate source, regard for that source involves reference to the intention with which the relevant language was uttered.

Consider a court's application of a statute to a case before it, a statute which arguably controls the outcome. Why does a court pay any attention to it at all, in either the sense intended by its enactors or in some standard sense of the words themselves? Why doesn't it give equal deference to some other form of words found in a text book or, for that matter, in a cookbook? The answer usually is that the words of the statute were used by certain people on a

tells us something about the reasons the expression was uttered. See P. JUHL, *supra* note 5, at 99-109. See also C. ALTIERI, *supra* note 8, at 147; E. HIRSCH, *supra* note 8, at 62-63; Grice, *supra* note 8, at 387; Knapp & Michaels, *Against Theory 2: Hermeneutics and Deconstruction*, 14 CRITICAL INQUIRY 49, 60 (1987).

10. See P. JUHL, *supra* note 6 at 106-12. The practical consequences of the contrary approach are illustrated by an example Knapp and Michaels give as a part of a larger argument: "Perhaps the speaker is a passenger in a car that has just pulled up to a railroad crossing. He says 'go' but the driver hesitates when she notices that the gate is down and a train is approaching. . . . Suppose the driver knows when the passenger says 'go,' he means 'stop'; nevertheless she insists on taking 'go' to mean what it means according to the conventions of English, that is 'go.' . . . The driver, knowing what he intends, chooses to disregard it, preferring instead the conventional 'verbal' meaning. Such a response might seem odd in the context of this example, since disregarding the passenger's intended meaning could be suicidal." Knapp & Michaels, *supra* note 9, at 54. See *id.* at 63.

11. This idea of a speech act as a purposive action, as a way of doing something, is generally associated with Wittgenstein's later work. See, e.g., L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 20e, 128e, 137e (Nos. 43, 432, 491) (G. Anscombe trans. 1953). Charles Altieri has summarized Wittgenstein's position insofar as relevant here: "Wittgenstein, unlike the Oxford philosophers, did not trust in language, itself, or in established conventions as the primary object of grammatical analysis. He was careful to link the metaphor of language games with the looser one of *forms of life* because he saw that philosophy's ultimate subject was not the language but the ways men used language." C. ALTIERI, *supra* note 8, at 52. See also C. ALTIERI, *supra* note 8, at 24, 99-102; J. AUSTIN, HOW TO DO THINGS WITH WORDS 99-121 (2d ed. 1975); Davidson, *supra* note 8, at 435, 443-46; Graff, *supra* note 7, at 408-09.

certain occasion following a certain procedure. And we have prior binding law which tells the judges that when words are used by those people, on that kind of occasion, following those procedures, those words are binding law. In developed legal systems, the quality that makes certain words law is not their location in a certain book but the circumstances in which they were uttered.¹² It is, of course only because of those circumstances that someone felt obliged to reproduce the words in a statute book at all. The view of law I employ here is recognizably positivist. That conception is, in some ways, controversial. But when, as here, we are interested in whatever legal forces attaches to enactments—constitutions, statutes, regulations—the explanatory power of positivism is particularly strong.¹³

The words of the statute control because they are the manifestation of an authorized act of legislation.¹⁴ A court is controlled by "what the legislature did," not by some independent power inhering in the words they used. Those words are mere artifacts of the critical act. Moreover, that critical act is an exercise of human will. Irresistibly, therefore when we consider the binding force of law, we are drawn to a purposeful human deed. The nature of that deed cannot be understood apart from the purpose with which it was undertaken.¹⁵ The words of a statute or constitution were uttered with the intention of giving effect to that will. A statute cannot be understood as law apart from the intention with which it was enacted.

It follows from this that an unconscious or accidental use of words by the legislature cannot create unintended law. Such utter-

12. See H. HART, *THE CONCEPT OF LAW* 91-96 (1961). There is a sense in which this is true not only of legal enactments but of any utterance which is taken as an *order*. Strawson, *Intention and Convention in Speech Acts*, in *PHILOSOPHY OF LANGUAGE* 23, 35 (J. Searle ed. 1971).

13. Indeed, we commonly refer to such enactments as "positive law" which we define exactly as that which is "adopted by proper authority." *BLACK'S LAW DICTIONARY* 1324 (4th ed. 1956). One might argue that positive law does not exhaust law or that positive enactment is not sufficient to create law. But once we have agreed that an enactment has some legal force we have little choice but to think that that force is a consequence of the process of enacting it.

14. This notion is reflected in the terms we use for statutes including "act," "enactment," and "legislation." In the same way "constitution" may be regarded as the nominalization of the verb, "to constitute." This is a particular instance of the idea mentioned above in notes 9-10, that our interest in language use is in its employment as a purposive act.

15. "[A need to apprehend a speaker's intentions] is always present in discourse, since besides grasping what someone means in the sense of what he is saying, we must make out why he says it—what relevance he takes it to have, what point he is driving at, and so on." Dummett, *A Nice Derangement of Epitaphs: Some Comments on Davidson and Hacking*, in *TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON* 459, 474 (E. LePore ed. 1986).

ances would not represent the will of the authorized law maker. This, and the more general point, are illustrated by an actual case in which a court had to construe an admittedly bizarre set of words used by the authorized law makers, words whose standard meaning could not possibly have coincided with the act of will intended by the human beings involved. In *Cernauskas v. Fletcher*¹⁶ the Supreme Court of Arkansas had to construe a statute which dealt with the powers of municipalities to vacate streets and alleys. The last section of the statute included this perplexing language: "All laws and parts of laws and particularly Act 311 of the Acts of 1941 are hereby repealed." The supreme court must have been extremely reluctant to apply this statute in the sense of its standard meaning. Indeed the court hardly paused over the matter. "No doubt," the opinion asserts, "the legislature meant to repeal all laws in conflict with that act, and, by error of the author or the typist, left out the usual words 'in conflict herewith,' which we will imply by necessary construction . . ."¹⁷ I doubt whether many people would find this decision controversial. Yet it is in patent conflict with statutory words which have about as clear a standard meaning as can be found in the language.¹⁸

The assumption that statutes are law because they are expressions of the will of the legislature is itself the application of a rule of law. That law is the Constitution. A similar kind of authorization may be found in article V for the binding legal character of constitutional amendments. But there is no obvious legal counterpart in the case of the original Constitution. This brings us back to the main theme. If the Constitution is law, how did it acquire that status? Quite clearly it was not created as law in pursuance of some law-making power established by prior law.¹⁹ But this is not to say that

16. 201 S.W.2d 999 (Ark. 1947). See also *Poisson v. d'Avril*, 244 Ark. 478A (1968), reported in R. MEGARRY, A SECOND MISCELLANEY-AT-LAW 185 (1973), a more sympathetic treatment of the plain words of the statute, that suspiciously disappeared from the law reports after its issuance on April 1.

17. 201 S.W.2d at 1000.

18. It is possible to construct a model of interpretation which omits reference to legislative intentions while still avoiding absurd constructions like that suggested by the statute's words in cases like *Cernauskas*. One such model would look for an intention only in the words of the statute but would supplement that intention with requirements that its expression be rational, intelligible, and institutionally appropriate and that interpretation take place in light of a statutory "purpose" which is independent of the intent of the legislators but is defined in terms of the assumed "end-state" of the good society. See Moore, *supra* note 6, at 259-65. It seems to me that the clear appropriateness of these factors is more naturally understood as a consequence of our concern with "what the legislature did." They are not derived exclusively from the standard meaning of the text.

19. In fact, the creation of the 1787 Constitution was a rather explicit and conscious act of illegality in light of the existing legal procedure for altering the articles of confederation. See Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57 (1987).

the Constitution's status as law is unrelated to the people and circumstances associated with its creation.

The Constitution became supreme law as a result of the regard in which its rules and the process for making those rules were held at the time of its promulgation—that is as a consequence of a widely shared political understanding as to the sources and limits of law-making power. Put too simply, the sequence of the drafting and ratification of the Constitution was understood to express the will of “the people” in as clear a way as the institutions and traditions of that time permitted. And it was a political axiom of that day that all laws and constitutions were subject to revision or replacement by the sovereign people.²⁰ The critical point for my purposes is that the Constitution as law cannot materialize out of the air. We come to regard certain language as the Constitution because of something about the way it was uttered. Who can disagree with Walter Benn Michaels that “[n]o one would even try to interpret the Constitution if everyone thought it had been put together by a tribe of monkeys with quills.”²¹

It is my position, therefore, that interpretation of the Constitution consistently with the intentions of its enactors is inseparable from a determination to treat the Constitution as law.²² It is true, of course that there are other instances where we treat as legally binding speech or writing interpreted not according to the actual intentions of the utterer but according to its standard meaning. But each of those instances can be explained as consistent with the view of constitutional interpretation suggested here.

One apparent example of adherence to standard meaning is the prevailing English practice of statutory interpretation that bars reference to the legislative history of the enactment at issue.²³ It is not at all clear, however, that this practice is a rejection of the idea that statutes are to be interpreted to effect the intentions of the legislators. Rather it may be premised on the reasonable idea that the standard meaning most often coincides with the intended meaning and that it may be wasteful and often misleading to consult the legislative record as further evidence of that intention. Certain features of the English approach make this explanation entirely

20. *Id.* at 70-75.

21. Michaels, *The Fate of the Constitution*, 61 TEX. L. REV. 765, 774 (1982). At least we would not try to interpret it as binding legal rules.

22. The decision to regard the Constitution as law, of course, is not an inevitable one: But our legal system seems to have taken that fork irreversibly with the decision and acceptance of the decision in *Marbury*. See Kay, *Courts as Constitution-Makers in Canada and the United States*, 4 SUP. CT. L. REV. 23 (1982).

23. See R. WILSON & B. GALPIN, MAXWELL ON THE INTERPRETATION OF STATUTES 26-27 (11th ed. 1962).

plausible. It is well established that courts are to construe with reference to the mischief that Parliament set out to correct,²⁴ a maxim that only makes sense if the aim of construction is to follow the legislative intention. Similarly, courts must avoid an interpretation which would lead to a manifestly absurd result even if that result seems to be called for by the standard meaning of the words used.²⁵ The job of the interpreter, therefore, seems to be to search for something of which the standard meaning is merely evidence. When that evidence turns out to be defective it loses whatever force it possessed.

The same explanation is even clearer with regard to the weaker counterpart of the English approach once prevalent in this country: the "plain meaning rule" of statutory interpretation. This rule precludes reference to extrinsic aids to construction, including legislative materials, where the meaning of the statute is clear and unambiguous on its face.²⁶ It permits use of those aids, however, as soon as the language is ambiguous; as soon, that is, as there is no standard meaning. Presumably, in such cases the language, itself, is insufficient evidence of the meaning of the statute and requires supplementation. But as that supplementation is by recourse to what is clearly evidence of legislative intention, it follows that the unambiguous text is, itself, viewed as evidence, clear and sufficient evidence, of that intention.

With respect to each of these restrictions on statutory interpretation we might question whether a limitation of the investigation to the statutory text is ever the best way to go about discovering intended meaning. In fact, in recent years courts have shown increasing skepticism as to the wisdom of these restrictions.²⁷ My point is

24. *Id.* at 66-70. The same source, a standard reference on statutory construction opens with these words: "A statute is the will of the legislature, and the fundamental rule of interpretation to which all others are subordinate, is that a statute is to be expounded 'according to the intent of them that made it.'" *Id.* at 1-2.

25. See S. EDGAR, *CRAIES ON STATUTE LAW* 86-90 (6th ed. 1963). This rule will yield to particularly clear language. "[I]n that case the words of the statute speak the intention of the legislature." *Id.* at 87 (quoting *Warburton v. Loveland, D. & Ch.* 480, 489 (1832)). The connection between this rule and legislative intentions is made clear in the following quotation: "[A court should give to statutory words] their ordinary signification unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification and to justify the court in putting on them some other signification which though less proper, is one which the court thinks the words will bear." *River Wear Commissioners v. Adamson*, 2 App. Cas. 742, 746 (H.L. 1877) (Blackburn, J.) quoted in H. HART & A. SACKS, *THE LEGAL PROCESS* 1144 (tent. ed. 1958).

26. See 2A N. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* 73-90, 278 (1943).

27. The English rule on statutory interpretation has been in increasing disfavor, for example, in Canada insofar as it has barred recourse to the drafting history of statutes challenged as outside the constitutional legislative competence of the enacting legislature, see *Re*

only that neither restriction need be regarded as positing that statutory text alone is authoritative independent of the intention of the lawmaker.

Another area of law where mere text appears to control is that of contract. In that field a contract may be concluded when parties exchange communications whose standard meanings manifest a shared intention to contract even if it is shown that one of the parties never held such an intention.²⁸ Similarly a court is to exclude parol proof that the parties to a written contract intended it to mean something other than what the "plain, common meaning of the words" suggest.²⁹ In practice, however, the standard meanings of the words used have not exercised as complete a tyranny over the transactions created as these dicta would suggest. Some contrary doctrines of interpretation are well established. While the issue rarely arises, it is doubtful if courts would really enforce a contract that they thought was not intended as such by either party.³⁰ Similarly the equitable device of reformation can be employed to make the writing conform to the true intention.³¹ Parol evidence is always available to prove such a mistake,³² and, as is the case with the plain meaning rule on the construction of statutes, it may be used to show the parties' intention when the text is ambiguous. Ambiguity is found without much difficulty.³³

The objective interpretation of contracts does result in cases in which a contract provision is applied in the teeth of plausible evidence that it was not jointly intended by the parties to govern. This

Anti-Inflation Act, [1976] 2 S.C.R. 373, 438-39, 471-72, as well as to the expressed intentions of the drafters of the Constitution itself (a statute of the British Parliament). See, e.g., Re § 94(2) of Motor Vehicle Act (B.C.) 1985, 2 S.C.R. 486, 5505-07. The American "plain meaning rule" has likewise been vigorously criticized and often disregarded in practice. See N. SINGER, *supra* note 26, at 278; H. HART & A. SACKS, *supra* note 25, at 1267-69.

28. See *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, J.), *aff'd*, 201 F. 664 (C.C.A.N.Y. 1912), *aff'd*, 231 U.S. 50 (1913).

29. *Attorney-General v. Shore*, 11 Sim. 592, 615 (1833-34), *quoted in* J. MURRAY, MURRAY ON CONTRACTS 241 n.77 (1974).

30. See *Davis v. Davis*, 119 Conn. 194, 201-02 (1934) (dicta). This result would seem to follow *a fortiori* from the rule that no contract exists when parties non-negligently attach different meanings to their purported expressions of assent. See *Raffles v. Wichelhaus* [1864] 2 H. & C. 906 (the "Peerless" case); RESTATEMENT (SECOND) OF CONTRACTS § 20(1) (1979); see also *Berke Moore Co. v. Phoenix Bridge Co.*, 98 N.H. 261 (1953) (interpreting contract according to mutual understanding of parties even where inconsistent with standard meaning). *But cf.* 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 95 (3d ed. 1957) (Commenting on the objective approach to interpretation of contract terms: "It is even conceivable that a contract may be formed which is in accordance with the intent of neither party.")

31. See, e.g., *Hoffman v. Chapman*, 182 Md. 208 (1943); E. FARNSWORTH, CONTRACTS § 7.5, at 471 (1982).

32. *Hoffman*, 182 Md. at 210-11; E. FARNSWORTH, *supra* note 31, at § 7.5, at 471-72.

33. E. FARNSWORTH, *supra* note 31, at § 7.12, at 501-02.

kind of question, however, only tends to arise in cases where one party subsequently claims that he held an understanding which is inconsistent with the standard meaning, while the other maintains that the standard meaning expresses the intention he has always held. If both parties are believed, contractual liability cannot attach as a result of a "meeting of the minds." But it does not follow that liability is imposed because the standard meaning of the contract language has some independent legal force. Rather such liability may follow from a judgment that it is proper to impose the cost of the misunderstanding on the party who acted carelessly by employing, without adequate explanation, words whose standard meaning differed from his intention. Where there is no such carelessness no liability is imposed.³⁴ It may not be entirely irrelevant that our modern action for breach of contract has roots in the general law of tort.³⁵

This explanation of the objective theory of contract formation and interpretation may illuminate another important feature of constitutional interpretation. The use of standard meanings in conflict with the parties' intentions in contract is the application of a policy inherent in the common law concerning the rights and duties of contracting parties. There is a sense in which a contract is itself law, but the creation and effect of that law is governed by prior and superior law.³⁶ In the same way we *might* have a constitutional rule requiring statutes to be interpreted in accordance with the standard meanings of their words even when that was contrary to the legislature's intended meaning. But for reasons already noted³⁷ that cannot be the case with constitutional interpretation. By definition,

34. See *supra* text accompanying note 30. In a well-known article, one writer noted that the proposal for the first Restatement of Contracts conceded three exceptions to the objective theory of contract formation: "[O]ne is not bound by his 'objective' assent (a) where he is non-negligent, (b) where both are negligent, or (c) where his negligence has not misled the other. These are not merely slight variations. On the contrary it is believed that by far the greater number of negotiations which do not result in actual meeting of the minds fall under these exceptions." Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CAL. L. REV. 441, 444 (1929). The same writer suggested that contract doctrine would more clearly represent the underlying policies if it maintained the requirement of subjective assent for contract liability and made negligent and misleading use of language in contract negotiations actionable in tort. *Id.* at 442. See also C. FRIED, *CONTRACT AS PROMISE* 66-67 (1981); Knapp & Michaels, *supra* note 9, at 63.

35. See Ames, *The History of Assumpsit*, in *SELECTED READINGS OF THE LAW OF CONTRACT* 33 (1931).

36. "The party ought to direct his meaning according to the law and not the law according to his meaning, for if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance and to destroy all learning and diligence." *Throckmorton v. Tracy*, 75 Eng. Rep. 221, 251 (K.B. 1559).

37. See *supra* text accompanying notes 20-22.

there is no positive law-behind-the-law which controls the creation, interpretation, and application of the Constitution in the way the common law does for contracts or a constitution might for statutes. The legal character of the Constitution is not attributable to prior law but to the pre-legal and pre-constitutional complex of social, historical, and political forces which give it legitimacy.³⁸ That fact makes it difficult to see the Constitution as anything other than the continuing effectuation of the act of will which is responsible for its legal status.

It is possible, of course, that the things which made the Constitution law in 1789 are not the things which make it law now.³⁹ While regard for the people and processes that enacted the Constitution may explain why it came to be accepted as law in the first place, it may be that those reasons have been replaced.⁴⁰ In contemporary society the political reasons underlying the status of a constitution as law may be of a kind that do not require an interpretation that refers to the intentional acts of the constitution-makers, but instead point to the constitution's standard meaning. But what could those reasons be?

The most convincing political justification for treating the standard meaning as law concerns the values of clarity, predictability, and stability. The virtues of constitutionalism, as I have noted, involve the creation of restraints that limit the ability of government to interfere arbitrarily in private decisionmaking and planning. Those limits are less useful to the degree that their content cannot be known in advance. The standard meanings, it is supposed, are, almost by definition, clearer, that is more available, than the original intentions.⁴¹

It must first be noted what limited consequences acknowledgment of this justification would have. It would only effect the interpretation of those constitutional provisions that have a standard meaning. As soon as we reach a provision which, on its face, supports more than one plausible meaning it would indicate no preferred interpretation. That would be the case with the most prolific sources of modern constitutional controversy, the due process clauses of the fifth and fourteenth amendments and the equal protection clause of the fourteenth amendment. Only if, for example, we discovered that the provision for two senators from each state

38. See Kay, *Preconstitutional Rules*, 42 OHIO S. L.J. 187, 188-93 (1981); see also Strawson, *supra* note 12, at 36 (distinguishing illocutionary acts which are essentially conventional and those not essentially conventional).

39. Kay, *supra* note 19, at 75-80.

40. See K. OLIVECRONA, *LAW AS FACT* 103 (1971).

41. Moore, *supra* note 4, at 258.

were really intended to result in say, three or five senators from some states would the rule give an answer and be of any consequence. As the example given shows, this will rarely happen.

But even putting such practical considerations aside, an argument that availability of meaning provides a justification for applying the standard meaning is obviously incomplete. Completing it, moreover, seems to draw us back irresistibly to the intentional act of the constitution-makers. This is because availability cannot, itself, tell us why we pay attention to the standard meaning of this particular text. We can find lots of texts whose meanings are clear and available—from the National League rules to the Manhattan telephone directory. We look to a constitution because it is already regarded as law and that brings us back to the process by which it was created, to the will of the constitution-makers.

It is possible, I suppose, to construct a sort of hybrid justification. It would concede that the Constitution, at one time, had the status of law because of the events of its creation. But at some point the justification changed to that of the desirability of clear and available rules. And the 1789 constitutional text was a convenient source of those rules given its prior acceptance. (Since that acceptance was a result of the circumstances of its creation, even here we see the apparently inextirpable appearance of the constitution-makers.) But this qualified explanation is so artificial as to make us doubt it really tells us anything about the reasons the Constitution continues to be viewed as binding law. When we compare it to our popular romance with constitution-makers, made so plain in our recent bicentennial celebrations, it looks implausible indeed.

Perhaps it is appropriate to close by reiterating the limited character of the argument I have made here. I have, in no way, brought into issue those approaches to constitutional adjudication which appeal to standards that are partially or totally independent of the text of the Constitution, however interpreted. In particular, I do not intend to argue that such approaches necessarily lack qualities which are essential to their designation as rules of law. I only mean to suggest that to the extent we would bind ourselves, in whole or in part, to rules inferred from mere marks and letters on paper without reference to the will of the human beings who selected those marks and letters, we enter a regime very foreign to our ordinary assumptions about the nature of the law.